Supreme Court, U.S.
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No. 03-690

In The

Supreme Court of the United States

CHRISTIAN A. BERTOLI,

Petitioner,

vs.

KENNETH OBERFELDER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there was instructional error where the jury was instructed to evaluate petitioner deputy sheriff's use of deadly force to determine whether shooting a fleeing suspect in the back to prevent his escape was objectively reasonable under the peculiar facts and circumstances within the petitioner's knowledge.

2. Whether the district court abused its discretion in awarding attorneys' fees.

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INTRODUCTORY STATEMENT

The petition for writ of certiorari makes no credible argument why this Court should examine an unpublished memorandum opinion in a case involving fact-bound, case-specific jury instructions and highly discretionary lower court rulings on an attorneys' fees award. No showing of any kind has been made that the issues posed here extend beyond this case, that the opinion conflicts with any other opinion, that the opinion under review is likely to cause the slightest confusion to anyone, or that any error was committed.

No matter how artfully petitioner tries to craft the first question presented, he simply does not raise any legitimate issue of qualified immunity. It has long been settled that qualified immunity from suit is available in deadly force cases to police officers who have an objectively reasonable belief that their safety or that of others is threatened. Petitioner's argument to the contrary notwithstanding, the jury instructions given this particular jury required it to resolve that very question. Unfortunately for the petitioner, despite these instructions, the jury found that he shot respondent in the back to prevent his escape, a conclusion supported by overwhelming evidence.

The second question posed by the petition fares no better. Petitioner asks this Court to review a highly discretionary ruling of the experienced Chief Judge of the United States District Court for the Northern District of California. The district court concluded that this case presented exceptional circumstances justifying a modest enhancement based on its factual finding that respondent would not have secured counsel had the district court not appointed counsel for him. That conclusion, contained in

an unpublished district court opinion, and affirmed unanimously in an unpublished court of appeals opinion, simply does not merit this Court's attention. The two opinions will have no precedential value, will engender no confusion, and are plainly correct.

STATEMENT OF THE CASE

A full statement of the facts is necessary in this opposition because the Petition for Writ of Certiorari fails to give the Court either a complete or a fair picture of the evidence. Moreover the petition does not recognize the standard by which this Court is required to review that evidence, indulging all facts and factual inferences that reasonably support the jury's verdict. Instead, petitioner proceeds as though the jury credited *his* version of the facts rather than respondent's. In point of fact, even a superficial analysis of the verdict reveals that the jury, faced with overwhelming evidence, concluded that petitioner shot respondent in the back to prevent respondent's escape and not because petitioner had any objectively reasonable basis to believe that either he or anyone else was in any physical danger. This case does not, therefore, provide a suitable vehicle for this Court to consider any issue involving jury instructions on the subject of qualified immunity.

A. Respondent Files Suit After Petitioner Shoots Him In The Back To Prevent His Escape

This case arises out of an incident on June 27, 1996, in Petaluma, California, during which petitioner Sonoma

County Deputy Sheriff Christian Bertoli shot respondent Kenneth Oberfelder in the back.

On June 20, 1997, respondent filed a complaint *in pro per* in Sonoma County, California, Superior Court, naming petitioner and various public officials including the Sonoma County Sheriff, the City of Petaluma, the County of Sonoma and other public entities alleging that his constitutional rights were infringed when he was shot. Defendants removed the case to federal court on April 10, 1998, and the matter was assigned to Chief Judge Marilyn Hall Patel who had over twenty years of experience on the district court bench hearing cases brought under the Civil Rights Act.

B. The District Court Appoints Counsel To Represent Respondent Without Objection From Petitioner Or Any Other Defendant

In July, 1998, respondent wrote to Chief Judge Patel, explaining that he was incarcerated at the Federal Detention Facility in Dublin, California, where he was awaiting sentencing on various drug charges. Respondent reported that he had not succeeded in retaining counsel to represent him, and that he lacked funds to make meaningful contact with potential counsel.

The court concluded that respondent was in need of and had requested counsel, and found that Ms. Jo Saxe Levy (nee Kerlinsky) of Crosby, Heafey, Roach & May, had agreed to accept appointment as respondent's counsel. The court appointed Ms. Levy to represent respondent pursuant to 28 U.S.C. § 1915(e)(1) and the Northern District of California's Federal Pro Bono Project.

Petitioner did not object to this appointment. In fact, at no time in the district court did petitioner question respondent's financial status, even though an inability to afford counsel is a predicate to appointment of counsel under the federal *in forma pauperis* statute. *See* 28 U.S.C. § 1915(e)(1).

C. Trial Proceeded Against Petitioner Only And The Evidence Established That Petitioner Shot Respondent In The Back After Respondent Had Already Driven Past Petitioner

Six months before the date of the shooting, the Sonoma County Sheriff's Department began investigating respondent as a suspected drug dealer. After several months of failing to catch respondent selling drugs, the Sheriff's Department decided to use an undercover informant to set respondent up for arrest on drug charges. The plan was for six vehicles, including four unmarked, undercover trucks and one helicopter, to follow respondent and prevent his escape.

The Sheriff's Department effected its plan on June 27, 1996. On that date, respondent met in a parking lot with the undercover informant chosen by the Sheriff's Department to set up the drug deal. Petitioner and at least two other undercover agents followed respondent as he drove his 1983 Volvo sedan from the parking lot and to various locations in and around the city of Petaluma. When it became apparent that respondent was headed to a particular residence in Petaluma, Sergeant Rochester ordered petitioner and two other undercover officers to arrest respondent upon his arrival at the residence.

Petitioner, driving a pick-up truck, arrived at the residence while respondent was backing his Volvo into the driveway. However, before respondent turned off the engine or exited the car, petitioner pulled to an abrupt stop in front of the house. Without waiting for respondent to exit the Volvo, petitioner, wearing blue jeans, a baseball cap and sporting long, disheveled hair, ran from his vehicle with his gun raised and pointed at respondent's head.

Petitioner saw respondent look at him, turn his head away, reach down and shift the car into drive. Petitioner told the Petaluma Police Department on the night of the shooting that, at that point, he understood respondent was making a move to escape.[1]

The jury heard an expert reconstructionist who reviewed all the physical evidence and concluded that the Volvo exited the driveway turning right at a speed between five and seven miles per hour and was traveling between ten and thirteen miles per hour *away* from petitioner at the time petitioner fired his weapon. The bullet shattered the rear passenger window on the driver's side. Exhibit 248, admitted into evidence at trial and included in the appendix to this brief, demonstrates the

[1] Respondent's testimony, which the jury is presumed to have accepted, was that after he backed into the driveway, he saw a man with long hair and a crazed, angry look, jump out of a truck and point a gun at him. His attention focused on the gun; he did not read the words on the man's shirt or notice the star on his baseball cap. Respondent did not know who the man was, and thought it was someone who was trying to kill him. Afraid for his life, respondent put the Volvo in drive and, even before the front bumper reached the roadway, began steering the Volvo to the right – away from petitioner.

approximate relative position of petitioner with respect to the Volvo at the time of the shooting. (Resp. App. at 1a)

Respondent drove another few blocks, then pulled over and was apprehended. He was taken by helicopter to a local hospital where he was admitted and he remained for eight days.

On May 11, 2001, the jury returned its special verdict finding that petitioner had used excessive force against respondent, that the excessive force caused respondent's injuries, and that the amount of respondent's injuries was $100,000.

A motion for new trial was made on June 27, 2001, and opposed on August 10, 2001. The motion was denied on October 9, 2001. Judgment was entered on October 15, 2001.

D. The District Court Awarded Respondent His Attorneys' Fees And Costs

On July 23, 2001, respondent filed a motion for attorneys' fees. Petitioner opposed the motion, and on January 29, 2002, the district court issued a 17-page unpublished order in which it concluded that respondent was entitled to his attorneys' fees and costs. (Pet. App. at 52a-56a) The court calculated $627,062 as the lodestar for respondent's attorneys' fees. Then, drawing on its direct observation of the proceedings and its extensive experience in cases of this nature, the court determined this was an exceptional case presenting unusual circumstances justifying enhancement of the lodestar figure. (Pet. App at 53a-56a) It concluded a multiplier of 1.5 was warranted and awarded $940,593 for attorneys' fees. The court also

awarded $62,305.78 for pre-trial and trial costs, and $19,261 in fees and $7,764.04 in costs connected with the motion for fees.

E. The Court Of Appeals Affirms The Judgment And The Award Of Attorneys' Fees In An Unpublished Memorandum Opinion

On November 5, 2001, petitioner filed his notice of appeal from the judgment on the jury's verdict, and on February 27, 2002, he filed a notice of appeal from the order awarding fees. The court of appeals consolidated the two appeals for oral argument. On March 10, 2003, the consolidated case was argued before Judges Kozinski, Graber and Berzon, and on June 4, 2003, the Court issued its unpublished memorandum opinion affirming both the judgment and the fee award. Petitioner's petition for rehearing was denied on August 8, 2003.

REASONS FOR DENYING THE PETITION

A. This Case Does Not Present The Question Whether Petitioner Was Deprived Of The Opportunity To Present A Qualified Immunity Defense To The Jury

Petitioner's principal concern here and in the court of appeals seems to be that the defense of qualified immunity never went to the jury. Why this should raise a certiorari-worthy issue for this Court, even if correct, is never explained. But in any event, petitioner is plainly wrong.

The *first prong* of the qualified immunity issue – the objective reasonableness of petitioner's belief that his life

was in danger – was in fact placed before the jury and the *second prong* – whether the law was reasonably clear – was not a jury question and in any event was conceded by petitioner at the trial. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Petitioner seems to claim that the jury never resolved two questions: (1) whether a reasonable officer would have believed that the use of deadly force was appropriate; and (2) whether the officer had a reasonable but mistaken belief as to the facts establishing the existence of his need to use such force. (Pet. at 11) Tellingly, petitioner makes this claim without ever advising the Court exactly what the jury was told. The reason, no doubt, is that the instructions given the jury in this case required the jurors to resolve precisely those two issues.

The jury was told that: "Deputy Bertoli's use of deadly force was objectively reasonable only if under the facts and circumstances within Deputy Bertoli's knowledge, including his background and experience, a reasonable officer would have probable cause to believe that Mr. Oberfelder posed a significant threat of death or serious physical injury to himself or others."[2]

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[2] The full instructions on excessive force were as follows:

Any peace officer who has reasonable cause to believe that an individual to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.

In this case, you're to assume that Deputy Bertoli had probable cause to arrest Mr. Oberfelder.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of

(Continued on following page)

This instruction fully embodied the two questions petitioner contends were not presented to the jury. First, the instruction required the jury to determine whether petitioner had an objectively reasonable belief that respondent posed "a significant threat of serious physical injury or death to himself or others." It did not require that petitioner *in fact* have been under a threat. So long as

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the resistance or threatened resistance of the person being arrested. Nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest, or to prevent escape, or to overcome resistance.

Any individual who is being arrested by a peace officer has a duty under the law not to resist the detention or the arrest.

It is also not disputed in this case that defendant, Deputy Bertoli, used deadly force when he fired his weapon. Deputy Bertoli's use of deadly force was objectively reasonable only if under the facts and circumstances within Deputy Bertoli's knowledge, including his background and experience, a reasonable officer would have probable cause to believe that Mr. Oberfelder posed a significant threat of death or serious physical injury to himself or others.

The determination of the reasonableness of Deputy Bertoli's belief must be judged from the perspective of a reasonable officer on the scene at the time he fired his weapon, rather than from the perspective of viewing the event after it has already occurred.

Your determination must embody allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation in circumstances that are tense, uncertain and rapidly evolving.

The constitution forbids the use of deadly force to prevent the escape of a suspect when he poses no immediate threat to the officer and no threat to others. (RT 1332:21-1334:7)

"a reasonable officer" in petitioner's position at the time would reasonably have concluded there was a threat, petitioner was free to use deadly force.

Second, the instruction directed the jury to consider the "facts and circumstances within Deputy Bertoli's knowledge." By finding in favor of respondent, the jury implicitly concluded petitioner's actions were not reasonable in light of his knowledge of the facts and circumstances, an eminently reasonable conclusion considering petitioner shot respondent in the back after respondent's car had passed him.

The instruction proposed by petitioner added nothing to the one given by the district court. That instruction would have told the jury:

> A law enforcement officer is protected by qualified immunity if a reasonable officer could have believed his conduct was justified. In this case, you must decide whether a reasonable officer would have believed that their [sic] life was in danger at the time of the incident. Conduct is considered reasonable unless it is obvious that no reasonable officer would have taken the same action under the same or similar circumstances.

This instruction did not differ materially from the one actually given by the district court.[3]

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[3] According to petitioner, his proposed instruction would have told the jury that "[t]he defense of qualified immunity is intended to protect a law enforcement official unless they [sic] are plainly incompetent or knowingly violate the law." (*See* Pet. at 5) However, petitioner's proposed instruction did not actually *require* the jury to make a finding of "plain incompetence" (whatever that may mean) or "knowing

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Had the jury found that petitioner was "reasonably mistaken about his belief that his life was in danger," it could not have found – as it must have under the trial court's instructions on excessive force – that no reasonable officer would have probable cause to believe that respondent posed a significant threat of death or serious physical injury to himself or others. It is simply untrue, as claimed by petitioner that the jury was never asked to determine whether petitioner was reasonably mistaken that his life was in danger. Not only was it asked that very question, but it found that respondent had proved by a preponderance of the evidence that the answer to the question was "no."[4]

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violation of the law." And in any event, an officer who uses deadly force in the absence of a reasonable belief that he or anyone else is in danger is, by definition, incompetent, and no separate jury finding of "incompetence" is either required or appropriate.

[4] *Snyder v. Trapagnier*, 142 F.3d 791 (5th Cir. 1998), cited by petitioner [Pet. at 13], which was decided before *Saucier v. Katz*, 533 U.S. 194 (2001), is not persuasive for many reasons. First, its assumption that qualified immunity is a jury question is questionable after *Saucier v. Katz*, and is inconsistent with other authority from the same court. *See Mangieri v. Clinton*, 29 F.3d 1012, 1015-16 (5th Cir. 1994). Second, its view that the subjective understanding of the officer is the test [*see* 142 F.3d at 801] was not the law either before *Saucier* or since. *See Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001); *Saucier*, 533 U.S. at 204-207. Finally, as the Solicitor General in *Snyder* confessed to this Court (which consequently dismissed the certiorari petition on the ground that it had been improvidently granted), that case had proceeded to the jury on excessive force instructions that permitted the jury wrongly to conclude that although the officer used excessive force, he was still entitled to qualified immunity. *See Snyder v. Trepagnier*, No. 98-507, 1999 WL 170671 at *10 (U.S. Mar. 24, 1999) (Brief for the United States as Amicus Curiae Supporting Respondent).

B. There Is No Basis For This Court To Grant Certiorari To Review The Court of Appeals' Unpublished Opinion Affirming The District Court's Unpublished Exercise Of Discretion In Awarding Attorneys' Fees

Petitioner offers no reason why this Court should use its limited resources to review the court of appeals' decision affirming the district court's discretionary award of attorneys' fees. Petitioner does not contend the court of appeals' decision conflicts with the decision of any other court in any circuit. Nor does he even suggest that the question he presents arises with any frequency. In the end, then, he is attempting to lure this Court into examining an isolated and routine discretionary ruling by an experienced District Judge who fully understood when it is appropriate and when it is not appropriate to enhance an award of attorneys' fees.

Moreover, petitioner has waived many portions of his argument. For example, his contention that the record does not establish respondent's indigence or his inability to find volunteer counsel [*see* Pet. at 21] were not timely raised in the trial court. Petitioner did not object to the appointment of counsel, and certainly never questioned respondent's indigence, even though that status is a prerequisite to appointment of counsel under 28 U.S.C. § 1915(e)(1). Only in his opposition to the motion for attorneys' fees, long after the court appointed counsel for respondent, did petitioner for the first time, question the adequacy of the evidence that respondent would not have been able to obtain counsel had the district court not appointed counsel. And even then, petitioner did not submit any *evidence* to support his contention that respondent could have found counsel had he only looked longer and harder.

Factual questions such as these are generally inappropriate candidates for this Court's review. *See NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981) (concluding Court's grant of review of cross-petition was improvident because it presented "primarily a question of fact," "which does not merit Court review"); *see also* Sup. Ct. R. 10 (review "rarely granted" when petition asserts "erroneous factual findings"). Petitioner's failure to raise these questions in the district court at a time when respondent could have responded and further developed the record makes their consideration by this Court even more inappropriate.

Petitioner also never presented to the district court or the court of appeals his current argument that the award of attorneys' fees violated his due process rights under the Fourteenth Amendment. (Pet. at 21-22) He has therefore waived this argument as well. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416-417 (2001) (refusing to consider arguments not raised in court of appeal).

In addition to these procedural problems standing in the way of the Court reviewing petitioner's challenge to the enhancement, the court of appeals' decision is simply not in error. The court of appeals correctly concluded the district court did not abuse its discretion in using a 1.5 multiplier to enhance the lodestar. *See Guam Soc. of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 696 (9th Cir. 1996) ("The abuse of discretion standard applies not only to the basic fee computation but also to the multiplier.").

The district court's opinion reveals that it understood the governing principles: the lodestar sum is the rule,

multipliers are the exception, and the mere contingent risk of non-payment is not a proper basis to apply a multiplier. This particular District Judge has respected these principles not just in word, but in action as well, having not hesitated in other cases to reject a multiplier where to do so was appropriate. *See, e.g., Ortega v. O'Connor*, 1996 WL 724779, *5 (N.D. Cal. 1996). Here, however, Chief Judge Patel concluded the unique facts of this case presented exceptional circumstances justifying an enhancement.

This was not an abuse of discretion. Chief Judge Patel found on the basis of more than twenty years experience with cases of this kind, that respondent's status as a fugitive who was convicted of narcotics offenses and incarcerated in a federal prison camp in Arizona, and his inability to contact counsel, made it unlikely that his meritorious case would have ever seen the inside of a courtroom in the Northern District of California had counsel not agreed to take the case *pro bono*. *See Guam*, 100 F.3d at 697 (undesirability of case and low likelihood that other attorneys would have accepted it supported 2.0 multiplier). Counsel's superior performance also factored into Chief Judge Patel's decision. *See Wing v. Asarco, Inc.*, 114 F.3d 986, 989 (9th Cir. 1997) (the quality of counsel's representation and results obtained may also support a multiplier).

The court of appeals' unpublished memorandum opinion agreed with the district court as to each factor, and amplified on its reasoning, by explaining that when counsel is appointed rather than retained, market forces that normally ensure the reasonableness of a lodestar do not come into play. (Pet. at 6a) Even members of the panel who have not shied away from opposing enhancements in

other cases, concluded the district court did not abuse its discretion in enhancing respondent's attorneys' fees award. *Compare Guam,* 100 F.3d at 712-713 (Kozinski, J., dissenting in part). Thus, at each level, the question of the appropriateness of an enhancement was considered by jurists who have demonstrated respect for the limited application of enhancements.

Petitioner's principal legal argument why this Court should examine the court of appeals' decision consists of his contention that respondent's status as an incarcerated prisoner could not support an enhancement. (*See* Pet. at 18 ["The issue squarely presented here is whether the incarcerated status of a civil rights plaintiff is the 'exceptional circumstance' envisioned by this Court to justify a $334,000 fee enhancement on top of a $638,109 lodestar award."]) However, he cites no case holding that a plaintiff's incarceration is wholly irrelevant. Thus consideration of respondent's incarceration *as one of many factors* suggesting the undesirability of his case cannot constitute error. Moreover, even if that factor was in error, it would not require reversal. *Fadhl v. City and County of San Francisco*, 859 F.2d 649, 651 (9th Cir. 1988) (enhancement is proper so long as any of the reasons on which the district court legitimately relied would support it). For all of these reasons, the challenge petitioner attempts to bring to the award of attorneys' fees is inappropriate for this Court's review.

CONCLUSION

The Petition for Writ of Certiorari offers no plausible basis for the writ to issue and the petition should, accordingly, be denied.

DATED: December 9, 2003.

Respectfully submitted,

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Where was Officer Bertoli Relative to the Vehicle and Mr. Oberfelder When He Fired?